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Supreme Court, U. S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES GREGG SIMMONS, PETIONER

v.

THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES GREGG SIMMONS, PETITIONER

v.

THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

James Gregg Simmons petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINION BELOW

The opinion of the Supreme Court of Georgia is set out in its entirety in Appendix B, *infra.*

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 9, 1980 (App. B, *infra*). Petitioner's motion for rehearing was denied on September 23, 1980 (App. A, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

QUESTION PRESENTED

Whether the Georgia Firearms and Weapons Act (App. D, *infra*) violates the due process clause of the Fourteenth Amendment in that it places the burden of proof on a criminal

defendant to prove certain exceptions and exemptions for prosecution under said act.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Georgia Code § 26-2907 and § 26-9915(a) as set out in Appendix D, *infra*, and the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT

NOTE: The Clerk of the Supreme Court of Georgia has not been requested to file a copy of the transcript in this case because the factual scenario that led to petitioner's arrest and conviction is of no importance for this Court's consideration of the question presented. Petitioner includes a brief synopsis of the facts in this case without reference to the transcript as background information only. The statement of the case portion of this section is presented in accordance with the rules of this Court.

James Gregg Simmons, petitioner, is a building developer and presently resides in Douglas, Georgia. He is an avid hunter and over the years has become interested in guns and considers himself to be a gun collector. At the time of the trial of this case, he had a collection consisting of twenty-five to thirty guns. While he has accumulated various guns over the years, he never owned any automatic weapons and he became interested in purchasing one automatic weapon for his collection.

On June 13, 1979, petitioner informed a hunting companion, Mr. Dwight Knight, that he was interested in purchasing an automatic weapon for his collection. Knight informed petitioner that he had located some of these weapons and the next day, June 14, 1979, petitioner drove to Moultrie, Georgia to meet with Knight and the man who had the weapons for sale. In Moultrie, petitioner met with Mr. Rex King at King's place of business. King ran a western shoe store, had a federal firearm's license, and dealt in guns from time to time. Petitioner informed King that he was interested in buying one automatic weapon and King told petitioner on this

date that he didn't have the gun but that a friend of his had it and had not returned it. Petitioner was advised to return the next day. King's testimony is highlighted in the Georgia Court of Appeals decision in this case. (App. C, *infra*).

On June 15, 1979, petitioner returned to Moultrie, Georgia and after meeting with Knight, the two drove to King's place of business in Knight's car. King's place of business is located in downtown Moultrie, Georgia and petitioner and Knight went there during the hours of daylight. Petitioner got out of the car and went inside King's place of business and King exhibited to him some six to eight automatic weapons of the type which petitioner had indicated he wanted to purchase for his collection. Unknown to petitioner, the weapons involved in the transaction were being provided by law enforcement officials and the entire transaction was being set up under the guidance of law enforcement officials, and the weapons were to be sold without complying with federal registration requirements. Petitioner agreed to purchase two of the automatic weapons and one silencer; paid for the weapons and placed them in Knight's car. Before leaving King's place of business, petitioner was advised that the guns were not stolen and King assured petitioner that he was a gun dealer. Petitioner informed King that he intended to register the guns. Petitioner got into Knight's car to leave the area and was arrested.

On July 10, 1979, petitioner was indicted for the offenses of machine gun possession and violation of the Georgia Firearms and Weapons Act. Petitioner was tried before a jury in Superior Court of Colquitt County, Georgia, and found guilty. At the conclusion of the state's case, petitioner made a motion for a directed verdict of acquittal questioning the constitutionality of the portions of the Georgia Firearms and Weapons Act under which he was being tried. This motion for a directed verdict was overruled by the trial court. The Court of Appeals of Georgia later ruled that the question of the constitutionality of the Georgia laws was not properly raised at the trial court. (App. C, *infra*). However, the Supreme Court of Georgia reversed that ruling (App. B, *infra*) and the question of the

constitutionality of the Georgia Firearms and Weapons Act and related statutes is properly before this Court.

Petitioner was sentenced on September 12, 1979 to serve five years on each of the two counts in the indictment. Petitioner filed a timely motion for new trial which was overruled by the trial court and entered on the record on October 29, 1979. The trial court's decision was appealed to the Court of Appeals of Georgia and that court affirmed petitioner's conviction on March 18, 1980. (App. C, *infra*).

On May 28, 1980, the Supreme Court of Georgia granted petitioner's petition for writ of certiorari, noting that the court was particularly concerned with whether or not Georgia Code Ann. §§ 26-2907 and 26-9915a unconstitutionally allocated to the defendent the burden of proof regarding the statutory exceptions or exemptions thereto. On September 9, 1980, the Supreme Court of Georgia affirmed petitioner's conviction and held that the statutory scheme of Georgia Firearms and Weapons Act was not unconstitutional as a violation of the due process clause of the Fourteenth Amendment. (App. B, *infra*). Petitioner's motion for rehearing of that decision was denied on September 23, 1980. (App. A, *infra*).

REASONS FOR GRANTING CERTIORARI

Petitioner was convicted of one count of possession of a machine gun in violation of Georgia Code Ann. § 26-2906 and one count of violation of the Georgia Firearms and Weapons Act. Georgia Code Ann. § 26-9912(a) (App. D, *infra*). Each of these statutory provisions have certain exceptions and exemptions thereto and statutory language placing the burden of proof on a criminal defendant to prove these exceptions and exemptions. See Georgia Code Ann. § 26-2907 and § 26-9915a (App. D, *infra*). As the Supreme Court of Georgia noted in its decision "...the Criminal Code § 26-2907 provides that the prosecution need not negative any exemption, whereas the Firearms Act contains not only that provision but also prescribes that the burden of proof of exemption shall be on the defendant." (App. B, *infra*). Petitioner questions whether the entire statutory scheme under which petitioner was arrested and convicted violates the Fourteenth Amendment and for purposes of this petition, petitioner refers to the entire statutory scheme as the Georgia Firearms and Weapons Act in the sake of brevity although technically § 26-2906 and § 26-2907 are included in the general criminal code of the state of Georgia and not the firearms act.

1. The essence of the due process clause of the Fourteenth Amendment demands that a citizen is innocent until proven guilty and the prosecution must prove that a citizen is guilty beyond a reasonable doubt before one can be convicted of a crime. *In Re Winship*, 397 U.S. 358; *Chambers v. Florida*, 309 U.S. 227; and, *Duncan v. Louisiana*, 391 U.S. 145. By reducing the burden of proof required for conviction in one instance and shifting the burden of proof in the other, the Georgia statutes under consideration clearly violate the foregoing fundamental rights.

Petitioner concedes that this Court in *Patterson v. New York*, 432 U.S. 197 suggested that state legislatures may "reallocate burden of proof by labelling as affirmative defenses at least some elements of the crimes now defined in their statutes." (432 U.S. at 210). At the same time this Court warned that there are obvious limits to such a practice and: "It is not within the province of the legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86. Of utmost importance, too, is the fact that the traditional affirmative defenses have been insanity, self-defense, alibi, entrapment and duress and the statutes under scrutiny here concern possession of firearms. See, e.g., 11 *Harv. Civ. Rights-Civ. Liberties L. Rev.* 390 (1976); and, 29 *Am. Jur. 2d Evidence* § 156 (1967).

Petitioner contends that the Georgia statutes under consideration represent an impermissible shifting of the burden of proof. Further, Georgia is not alone in this regard in that other states have in effect criminal statutes that follow the same pattern. See *State v. Neary*, 409 A.2d 551, a Rhode Island case. Thus, a consideration of petitioner's case by this Court will clarify the bounds a state legislature must stay within when drafting their firearms possession laws.

2. Within the past ten years, this Court has considered the due process requirements as to the burden of proof in criminal prosecutions in a variety of contexts.

In 1970, this Court decided *In Re Winship, supra.* in which a New York juvenile's conviction for stealing was reversed because his guilt was only determined by a preponderance of the evidence. This Court held that proof beyond a reasonable doubt is among the essentials of due process and fair treatment required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. Mr. Justice Brennan wrote: "Lest there remain any doubt about the constitutional stature reasonable-doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (397 U.S. at 364).

In *Mullaney v. Wilbur*, 421 U.S. 684, this Court held that the prosecution is required to establish all elements of a criminal offense beyond a reasonable doubt, and that presumptions which shift the burden of proof concerning such elements to the defendant are invalid. Citing *Winship, supra*, this Court concluded that the prosecution must prove all elements of a criminal offense beyond a reasonable doubt, and could not constitutionally shift the burden of proving such elements to the defendant.

In a landmark decision handed down last year, this Court reversed a murder conviction in a Montana State court, finding a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violative of due process. *Sandstrom v. Montana*, 442 U.S. 510. In *Sandstrom* this Court followed *Winship, Mullaney* and *Patterson, supra*, and held the jury instruction constitutionally defective, reasoning that the jury might have interpreted the presumption in the instruction as a conclusive presumption, which would conflict with the overriding presumption of innocence which is endowed upon an accused by law, and the jury might also have interpreted the presumption as being one shifting the burden of persuasion to the defendant to prove that he lacked the requisite mental state.

It is clear from these decisions that Ga. Code Ann. § 26-2907 and § 26-9915a are constitutionally defective.

Again, in this particular case, the petitioner was convicted of possession of a machine gun and a silencer under Ga. Code Ann. § 26-2906 and § 26-9912a. (App. D, *infra*). These code sections and other sections referred to within these code sections make it clear that the mere possession of a machine gun and silencer is not unlawful. The possession of a machine gun is not any more unlawful per se than possession of a pistol. Any citizen of Georgia can own and possess either type of weapon so long as they have the proper "licenses". Ga. Code Ann. § 26-2904, § 26-9914a. Both weapons can be lawfully possessed. It is when they are unlawfully possessed, that is, for example, without a license, that criminality attaches. Further, in order for possession of these weapons to be unlawful, none of the exemptions or exceptions set forth in Ga.

Code Ann. § 26-2907 and § 26-9914a can apply, for if any are applicable, the possession is lawful.

The statutory exemptions and exceptions are "facts critical to criminal culpability." (421 U.S. at 702). Under the present statutory scheme, the State of Georgia in a prosecution for possession of such weapons is not required to prove the possession "unlawful". The prosecution can simply prove possession. Once possession of the weapon is proven, the defendant than has the burden to prove that his possession is lawful. There is no question as to where this burden is placed. Ga. Code Ann. § 26-2907 provides:

> "A prosecution based upon a violation of sections 26-2901, 26-2902, 26-2903, or 26-2906 need not negative any exemptions."

Also, Ga. Code Ann. § 26-9915a provides in pertinent part:

> "In any . . . indictment, and in any action or proceeding brought for the enforcement of any provision of this law. . ., it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this law, *and the burden of proof of any such exception, excuse, proviso or exempion shall be upon the defendant.*" (Emphasis added).

These statutory provisions placing the burden of proving the exemptions and exceptions and thus in effect placing the burden upon defendant of proving his possesion lawful and refusing to require the prosecution to prove beyond reasonable doubt facts which make possession of certain weapons unlawful, is exactly the type of provisions proscribed by *Winship, Mullaney, Patterson* and *Sandstrom, supra.*

In this case the prosecution was required to show criminal intent ont he part of petitioner. It was an essential ingredient of the crimes charged. The exemptions and exceptions serve to negate the intent of petitioner. Under the statutory scheme here, the burden was upon petitioner to negate criminal intent by showing that one of the statutory exemptions or exceptions was applicable. This in effect relieved the prosecution from proving criminal intent, and allowed it to be presumed unless the petitioner shouldered the

burden of proof as to the exceptions and exemptions. Such a burden shifting provision is clearly contrary to the due process guarantees of the Fourteenth Amendment.

Moreover, it is clear that the exemptions and exceptions referred to in the definition of the crimes set forth in these code sections are essential ingredients of the crimes. To place the burden of proof upon a defendant as to the exceptions and exemptions under such circumstances is clearly unconstitutional. *Mullaney v. Wilbur, supra.* In short, in a criminal proceeding, "(T)he burden of proof must be on the state throughout; not sometimes on the state and sometimes on the defendant." *Wilbur v. Mullaney*, 496 F.2d 1303, 1307 (1st Cir. 1974).

3. The Respondent cannot contend that the exemptions and exceptions set forth here are peculiarly within the knowledge of a defendant and therefore the legislature was justified in placing the burden of proof on the defendant. *Tot v. United States*, 319 U.S. 463; and, *McFarland v. American Sugar Refining Co., supra.* A careful review of the exemptions and exceptions set out in Ga. Code Ann. § 26-2907 (App. D, *infra*) and repeated in Ga. Code Ann. § 26-9914a reveals that each one could easily be negated by the prosecution. However, the prosecution did not do so here and petitioner suggests it should not be the burden of a defendant to take on this responsibility. Such statutes are unconstitutional on their face.

4. Finally, the question presented is of crucial importance not only to this petitioner but to criminal defendants in other states as well. If state legislatures are allowed to go unchecked in their efforts to place burdens of proof on criminal defendants the long standing proposition in this country that citizens are innocent until proven guilty will become a fundamental right enjoyed only by our forefathers.

The importance of this basic tenant in our criminal justice system and the proposition that guilt must be proved beyond a reasonable doubt is clear. If statutes like the two under scrutiny here are allowed to stand, criminal defendants will be required in every instance to introduce evidence on their behalf thus losing the

right to make the final closing argument in jury cases and subjecting themselves to cross-examination for possible unrelated criminal conduct as an attack on their character. These are the most common problems arising under the firearms laws in Georgia and elsewhere and present one of the most compelling reasons why this Court should take this opportunity to clarify the law, and, to the extent necessary rectify a situation where criminal defendants are being denied due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys.

APPENDIX A

In the Supreme Court of Georgia

Case No. 36344

JAMES GREGG SIMMONS

v.

THE STATE

The Motion for a Rehearing was denied today.

September 23, 1980

MRS. JOLINE B. WILLIAMS, *Clerk*

APPENDIX B

In the Supreme Court of Georgia

Case No. 36344

JAMES GREGG SIMMONS

v.

THE STATE

Hill, Justice.

We granted certiorari in Simmons v. State, _____ Ga. App. _____ (59531 decided March 18, 1980), to determine the constitutionality of the burden shifting provisions of certain of our firearms laws, namely Code §§26-2906 and 26-2907 of the Criminal Code of 1968 (Ga. L. 1968, pp. 1249;, 1324), relating to machine guns, and section 6 of the Firearms and Weapons Act (Ga. L. 1968, pp. 983; Code Ann. § 26-9915a), relating to silencers and other firing devices and weapons. Upon further consideration we find that the burden shifting provisions of those laws are not involved here and affirm.

James Gregg Simmons was indicted for and found guilty of possession of a machine gun in violation of the former law and possession of a silencer in violation of the latter. Contrary to the decision of the Court of Appeals, we find that the constitutional challenge to these laws was raised in the trial court of the defendant's motion for directed verdict. Although the challenge could have been made earlier, it was not too late. A criminal defendant may challenge the constitutionality of the statute *the violation of which he was convicted* for the first time on habeas corpus, *Hammock v. Zant*, 243 Ga. 259 (253 SE2d 727) (1979), and

may challenge the constitutionality of such statute for the first time on appeal, *Barnes v. State*, 244 Ga. 302 (1) (260 SE2d 40) (1979). It follows that even though a criminal defendant may challenge, before trial, the constitutionality of the statute alleged in the indictment by demurrer, motion to quash, or plea in bar, by properly raising the constitutional objection,[1] it is not too late to challenge the statute on which an indictment is based on motion for directed verdict.

Sections 26-2906 and 26-2907 of our Criminal Code provide as follows:

§ 26-2906. "A person commits a felony when he sells, manufactures, purchases, possesses, or carries a machine gun and upon conviction shall be punished by imprisonment for not less than one nor more than five years. A machine gun is any weapon from which more than five years. A machine gun is any weapon from which more than eight shots or bullets may be discharged by a single function of the firing device. This section shall not apply to or affect the manufacture, for, or the transportation, or sale of machine guns to persons exempted under section 26-2907, provided said machine guns are broken down in a non-functioning state or are not immediately accessible."

§ 26-2907. "Sections 26-2901, 26-2902, 26-2903 and 26-2906 shall not apply to or affect any of the following persons while engaged in pursuit of official duty or when authorized by Federal or State law, regulation or order: (1) Peace officers: (2) wardens, superintendents, and keepers of prisons, penetentiaries, jails, or other institutions for the detention of persons accused or convicted of an offense; (3) persons in the military service of the State or of the United States; (4) persons employed in fulfilling defense contracts with the Government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract; and (5) district attorneys, investigators employed by and assigned to a district attorney's

[1]See 5 E.G.L. Constitutional Law § 183, p. 531 (1977).

office, and assistant district attorneys. A prosecution based upon a violation of sections 26-2901, 26-2902, 26-2903, or 26-2906 *need not negative any exemptions*." (Emphasis supplied.)

Sections 26-2901 and 26-2903 refer to the crimes of carrying a concealed weapon, deadly weapons at public gatherings, and carrying a pistol without a license.

The Firearms and Weapons Act (Ga. L. 1968, p. 983) refers to sawed-off rifles and shotguns, machine guns, dangerous weapons (e.g., bazookas) and silencers. Section 3 makes knowing possession of such weapons a crime. Section 5 (Code Ann. § 26-9914a) exempts certain law enforcement and peace officers including certain employees of the Board of Corrections, certain military serviceman, certain inoperable weapons, and persons authorized by the National Firearms Act (26 USC 5841-5862).[2] Section 6 (Code Ann. § 26-9915a) provides as follows: "In any complaint, information, accusation or indictment, and in any action or proceeding brought for the enforcement of any provision of this Act, *it shall not be necessary to negative* any exception, excuse, proviso or exemption contained in this Act, *and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant.*" (Emphasis supplied.)

It should be noted that the Criminal Code merely provides that the prosecution need not negative any exemption, whereas the Firearms Act contains not only that provision but also prescribes that the burden of proof of exemption shall be on the defendant.

Hence the Criminal Code provision in issue, Code § 26-2907, which merely provides that the prosecution need not negative any exemption is burden reducing but is not burden shifting. No contention is made that the Constitution is violated by this burden reduction (i.e., no contention is or could be made that the first two sentences in Code § 26-2906, standing alone, are unconstitutional); the Criminal Code provision shifts no burden to the defendant; and

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[2]It should be noted that the exemptions contained in the two laws are not identical but are substantially similar (compare Code §26-2907 with Code Ann. § 26-9914a).

hence the question raised on certiorari as to shifting the burden of proof is not presented by Code §§ 26-2906, 26-2907. Moreover, as will be seen below, the trial court placed no burden of proof on the defendant as to either of the two laws in issue. Therefore, defendant's conviction of possession of a machine gun is affirmed.

As heretofore noted, the Firearms and Weapons Act (Code Ann. § 26-9915a) does provide that "... the burden of proof of any exception, excuse, proviso or exemption shall be upon the defendant."[1] This act does not provide whether this burden of proof is one of producing evidence or one of persuasion (and if one of persuasion the degree thereof). In our view, the statutory provision itself is not unconstitutional. *Patterson v. New York*, 432 U.S. 197 (SC , LE2d) (1977). See also the discussion of *Morrison v. California*, 288 U.S. 591 (53 SC 401, 77 LE 970) (1933), in *Morrison v. California*, 291 U.S. 82, 87-89, (54 SC 281, 78 LE 664) (1934), approved in *Patterson*, supra, fn. 9. See also *United States v. Paulton*, 540 F2d 886, 892 (8th Cir. 1976).

Moreover, in the case before us, in accord with *State v. Moore*, 237 Ga. 269 (1) (227 SE2d 241) (1976), the trial court did not charge that the burden of proof of exemption is upon the defendant. The trial judge charged the presumption of innocence, the state's burden of proof beyond a reasonable doubt as to each element of the crime, and that the state's burden of proof in a criminal case never shifts to the accused to prove his innocence, omitting all reference to the statutory language as to negativing exemptions and the statutory burden of proof upon the defendant. In fact, because there was no evidence as to any exemptions the trial judge did not charge the jury as to exemptions (although the defendant had requested a charge as to the exemptions in the Firearms Act, Code Ann. § 26-9914a) until the jury asked for clarifying instruction as to any exemptions regarding machine guns, at which time the court merely gave in charge the exemptions applicable to machine guns, Code § 26-2907,

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[1]The above discussion as to burden reduction would be equally applicable to the provision in Code Ann. §26-9915a that "it shall not be necessary to negative any exception. . . ."

plus the National Firearms Act exemption from Code Ann. § 26-9914a (d) as to machine guns and silencers. Hence, although the issue of exemptions was raised by defendant's request to charge, no burden shifting or burden reducing charge as to those exemptions was given. It follows that both convictions, as to the possession of a machine gun and silencer, should be affirmed.

Judgment affirmed. All the Justices concur.

September 9, 1980.

APPENDIX C

In the Court of Appeals for the
State of Georgia

Case No. 59531

Banke, Judge

The defendant was convicted of one court of possession of a machine gun in violation of Code Ann. § 26-2906 and one count of possession of a silencer in violation of the Georgia Firearms and Weapons Act (Code Ann. § 26-9912 (a)). He was sentenced to five years' imprisonment and now appeals the denial of his motion for new trial. Although seven alleged errors are enumerated, five of these are directed to the sufficiency of the evidence and will be considered together.

Held:

1. The defendant contends that constitutional standards of due process placed on the state the burden of proving that he was not entitled to possess the weapons under one of the exemptions listed in Code Ann. § 26-2906 or Code Ann. § 26-9912 (a). However, Code Ann. §§ 26-2907 and 26-9915 (a) specifically provide that the defendant has the burden of establishing entitlement to these exemptions. The defendant's contention that these statutes are unconstitutional was not advanced in the trial court and therefore may not be considered on appeal. *Andrews v. Mayor & c. of Savannah*, 25 Ga. App. 182 (2) (102 SE2d 875) (1920); *Wellfort v. Bowick*, 147 Ga. App. 565 (4) (249 SE2d 363) (1978).

2. The defendant does not deny that he purchased the machine gun and silencer but contends that there is nothing to refute his testimony that he acted with the innocent belief that he could

register the items and add them to his private gun collection rather than with criminal intent or wrongful purpose. However, the dealer who sold the weapons to the defendant testified as follows: "He [the defendant] wanted to know the type of weapons. How many I could get. And silencers, M-16's. He wanted M-16's. He wanted those with silencers. He wanted grenades. Phosphorus grenades. Silenced .22 rifles. Silenced .22 pistols. He wanted antitank weapons. He wanted antitank bazookas. Light weight antitank weapons. He wanted all the ammunition I could get for antitank rifles and any M-1's as many as I could buy." Asked whether he knew what the defendant intended to do with the weapons, the witness responded, "Yes, sir. Both he and Dwight [a co-defendant] commented on this. They were going to keep some for their own selves. They were having problems with some shipments. Contraband coming out of South America and they had lost six out of ten of their last ship loads and there was some people involved in their organization and they wanted to wipe them out." We hold that this testimony was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the defendant acted with criminal intent in making the purchases.

3. It was not error to deny the defendant's motion to quash the indictment because he had not received a committment hearing. See *State v. Middlebrooks*, 236 Ga. 52, 54 (222 SE2d 343) (1976); *Walker v. City of Atlanta*, 238 Ga. 723, 724 (235 SE2d 28) (1977).

4. Any error committed by the trial judge in initially failing to charge the jury on the exemptions listed in Code Ann. § 26-9914 (a) was cured by his action in calling the jury back from their deliberations to instruct them on this statute as requested.

Judgment affirmed. McMurray, P.M., and Smith, J., concur.

APPENDIX D

Ga. Code Ann. § 26-2901 Carrying a Concealed Weapon.
(Not applicable to this case)
Ga. Code Anna. § 26-2902 Deadly Weapons at Public Gatherings.
(Not applicable to this case)
Ga. Code Ann. § 26-2903 Carrying Pistol Without License.
(Not applicable to this case).

Ga. Code Ann. § 26-2906 Machine guns; Sale, etc., Illegal

"A person commits a felony when he sells, manufactures, purchases, possesses, or carries a machine gun and upon conviction shall be punished by imprisonment for not less than one nor more than five years. A machine gun is any weapon from which more than eight shots or bullets may be discharged by a single function of the firing device. This section shall not apply to or affect the manufacture, for, or the transportation, or sale of machine guns to persons exempted under section 26-2907, provided said machine guns are broken down in a nonfunctioning state or are not immediately accessible."

Ga. Code Ann. § 26-2907 Same; Exemptions

"Sections 26-2901, 26-2902, 26-2903, and 26-2906 shall not apply to or affect any of the following persons while engaged in pursuit of official duty or when authorized by Federal or State law, regulation or order: (1) peace officers; (2) wardens,

superintendents, and keepers of prisons, penetentiaries, jails, or other institutions for the detention of person accused or convicted of an offense; (3) persons in the military service of the State or of the United States; (4) persons employed in fulfilling defense contracts with the Government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract; and (5) district attorneys, investigators employed by and assigned to a district attorney's office, and assistant district attorneys. A prosecution based upon a violation of sections 26-2901, 26-2902, or 26-2906 need not negative any exemptions."

Ga. Code Ann. § 26-9912a Same; Punishment

"A person commits an unlawful possession of firearms or weapons when he knowingly has in his possession any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon or silencer, as defined in this law [§§ 26-9910a through 26-9916a], and upon conviction for such he shall be punished by imprisonment for not less than one nor more than five years.

Ga. Code Ann. § 26-9915a Same; Burden of Proof of Exceptions, etc.

"In any complaint, information, accusation or indictment, and in any action or proceeding brought for the enforcement of any provision of this law [§§ 26-9910a through 26-9916a], it shall not be necessary to negative any exception, excuse, proviso or exemption contained in this law, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant."

NO. 80-836

DEC 29 1980

MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1980

JAMES GREGG SIMMONS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Georgia firearms laws improperly shift the burden of proof to a defendant.

2.

Whether the burden of proof was impermissibly shifted to the Petitioner under the facts and charge in the instant case.

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NO. 80-836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES GREGG SIMMONS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, James Gregg Simmons, was indicted by the Superior Court of Colquitt

County, Georgia, on July 10, 1979. Petitioner was charged with the possession of a machine gun in violation of Ga. Code Ann. § 26-2906 and with possession of a silencer in violation of Georgia Firearms and Weapons Act. Petitioner received a jury trial on these charges. At the conclusion of the State's case, Petitioner attacked the constitutionality of the statutes challenged in the instant petition by way of a motion for a directed verdict. This motion was overruled. Petitioner was subsequently convicted by the jury and sentenced on September 12, 1979, to five years imprisonment on each of the two counts.

Petitioner filed a motion for new trial which was overruled by the trial court on October 29, 1979. Subsequently, Petitioner appealed to the Court of Appeals of Georgia.

Simmons v. State, 154 Ga. App. 234, 267 S.E.2d 806 (1980). In his appeal to that Court, Petitioner again raised the constitutional challenge to the Georgia statutes. The Court of Appeals determined that the Petitioner's constitutional challenge had not been properly pursued in the trial court and, thus, could not be raised on appeal. The Court of Appeals went on to note that the Petitioner did not deny that he purchased the machine gun and silencer, but merely asserted that there was nothing to refute his testimony that he acted with innocent belief that he could register these items. The Court of Appeals noted that this testimony was contradicted by the dealer who actually sold the weapons to the Petitioner in which the dealer asserted that the Petitioner wanted items other than the machine gun and silencer.

The dealer further testified that the Petitioner and his codefendant made statements that they were having problems with some shipments of contraband coming out of South America. Simmons, 154 Ga. App. at 235.

The Petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia again attacking the constitutionality of certain of the firearms laws in Georgia. The Supreme Court of Georgia determined that the constitutional challenge had been properly made and that the Court could consider the statutes. The Supreme Court noted that Ga. Code Ann. § 26-2906 specifies that it is a felony to possess a machine gun. Ga. Code Ann. § 26-2907 sets out certain statutory exemptions to the aforementioned statute. The Court noted that this section did not shift the burden

of proof, but merely stated that the prosecution "need not negative any exemptions." The Court found that the issue as to the shifting of the burden of proof was not raised by these two code sections. The Court also found that the trial court placed no burden of proof on the Petitioner as to either of the laws in question by the trial court's charge.

The Supreme Court of Georgia then considered Petitioner's conviction concerning the possession of the silencer. In relation to this conviction, Ga. Code Ann. § 26-9915a does provide that the burden of proof of any exception is upon the defendant. The Court determined that this provision was not unconstitutional in light of Patterson v. New York, 432 U.S. 197 (1977). The Court also noted that in the instant case, the trial court did not charge that the burden

of proof of an exemption was upon the Petitioner. The Supreme Court noted that all statutory language as to negating exemptions and the statutory burden of proof upon the defendant was omitted in the trial court's charge. The Court also noted that the trial court did not even charge the jury as to exemptions because no evidence was produced in this regard. Once the jury asked for a clarifying instruction as to any exemptions, the Court merely charged the exemptions listed under Ga. Code Ann. § 26-2907 and Ga. Code Ann. § 26-9914a(d) as to machine guns and silencers. The Supreme Court of Georgia thus found that there was no burden shifting or burden reducing charge given as to the exemptions. The Supreme Court of Georgia thus affirmed the conviction. Simmons v. State, 246 Ga. 390, __ S.E.2d __ (1980).

Petitioner now seeks review in this Court in an attempt to again challenge the same

portions of the firearms laws of the State of Georgia.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE GEORGIA FIREARMS LAWS DO NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO A DEFENDANT.

Petitioner has alleged that certain provisions of the Georgia laws concerning firearms violate the Fourteenth Amendment. Petitioner relies on this Court's decisions in Sandstrom v. Montana, 442 U.S. 510 (1979) and Mullaney v. Wilbur, 421 U.S. 684 (1974), as well as others. Respondent asserts that none of the statutory provisions cited by the Petitioner create an unconstitutional presumption or burden shifting condition.

Petitioner asserts that the mere possession of a machine gun or a silencer is not a crime and that before it can be a crime, the

possession must fall outside of one of the statutory exceptions. Respondent asserts that Petitioner has misconstrued the statutory scheme of the State of Georgia in regard to firearms.

In considering the firearm laws of Georgia, it is clear that under Ga. Code Ann. § 26-2904, an individual can procure a license to carry any pistol or revolver. This code section does not extend to any other type of firearm. This section relates specifically to those sections making the carrying of a pistol or revolver without a license a crime. This code section does not make any reference to the type of weaponry involved in the instant case.

Under Ga. Code Ann. § 26-2906, the mere possession or carrying of a machine gun is a felony in the State of Georgia and is

punishable by a sentence of one to five years. Thus, contrary to Petitioner's contention, the mere possession of a machine gun is a crime in the State of Georgia. Ga. Code Ann. § 26-2907 goes one step further and provides certain exemptions or defenses to the crime of possessing or carrying a machine gun. In this section, certain specific persons are excluded from the previously mentioned law by virtue of their occupation. This code section does provide that the prosecution need not negative any of these exemptions in proving its case. In a case of possession of machine gun, it is clear that these exemptions do not constitute elements of the crime. The mere possession of the machine gun is a violation of Ga. Code Ann. § 26-2906. The exemptions are not elements required to be proven by the prosecution, but are defenses to be established by a defendant.

Similar provisions exist regarding silencers in Ga. Code Ann. § 26-9911a. This provision states that no person shall have a silencer in his possession except as provided in Section 26-9914a. Ga. Code Ann. § 26-9912a specifies that a person "commits an unlawful possession of firearms or weapons when he knowingly has in his possession any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon or silencer, as defined in this law. . . ." Ga. Code Ann. § 26-9914a provides exceptions to these latter provisions of the law. Under these provisions, which are specifically included under the Georgia Firearms and Weapons Act, contrary to the earlier provisions mentioned, the burden of proof of any exception is placed upon the defendant as well as stating that the prosecution need not negative any exception.

Before determining the constitutional issues presented by the Petitioner in the instant case, this Court must consider the constitutional issues reached and decided by the state courts. The state court did address §§ 26-2906 and 26-2907. The Court noted that under the criminal code, these provisions merely provide that the prosecution need not negative any exemption. Thus, these code sections do not improperly shift the burden of proof to a defendant. These sections set out a crime and the elements of that crime, then provide certain exceptions to this crime. These exceptions do not relate to the elements of the crime. Furthermore, as noted by the Supreme Court of Georgia, no burden of proof was placed on the Petitioner as to either of these two provisions of the law. Thus, Petitioner's contention as to his conviction of possession of machine gun is clearly without merit.

In considering the conviction for possession of a silencer, the Supreme Court of Georgia addressed the Firearms and Weapons Act of Georgia. This statute does provide that the burden of proof is on a defendant, but does not state the degree. The Court found that this provision was not unconstitutional, but went on to note that this burden of proof was not given to the jury in the trial court's charge. Thus, although the statute itself may shift the burden of proof, the Court did not shift the burden of proof in the instant case.

Respondent asserts that the mere statement that the prosecution is not required to negative an exception or exemption is clearly permissible under the decisions of this Court. The same type of provision has been challenged in the drug laws of Georgia under Title 79 A.

Similar statutes in regard to drugs exist in other states. In United States ex. rel. Kirchner v. Johnstone, 554 F.Supp. 14 (E.D. Pa. 1978), the Court considered a similar provision in the Pennsylvania Code where no evidence was presented by the prosecution that the defendant did not fall within a statutory exception. The Court noted that the key question was whether the exception was an essential element of the crime. The district court went on to note that it had been interpreted that the provision was not an element of the crime, but a personal defense. The Court noted that the exemption clauses did not refer to conduct which might be an element of the crime, but to persons who would be exempted. Similarly, in the instant case, the exceptions noted in the statutes do not refer to conduct and thus, to elements of the crime, but to specific persons who do not fall within the statutory prohibition.

A similar statutory provision exists in the federal code at 21 U.S.C. § 885(a)(1), which provides that the United States is not required to negative an exception or exemption under that chapter. The Seventh Circuit Court of Appeals found that if a defendant came within an exception or exemption in the statute, it was necessary for him to set up and establish it as a defense. United States v. Rowlette, 397 F.2d 475 (7th Cir. 1968); See McKelvey v. United States, 260 U.S. 353 (1922). The Court noted that exemptions and exceptions in that statute would be equated with affirmative defenses and would be a matter peculiarly within the knowledge of a defendant. The Court further noted that a defendant could be expected to produce the proof of those exceptions or exemptions.

Similar to these various statutes, the Criminal Code of Georgia allows certain exemptions or exceptions to the crime of possession of a machine gun and possession of a silencer. As in the above cited cases, it is clearly permissible to require a defendant to produce some sort of proof as to these exemptions. These exemptions are in the nature of affirmative defenses and do not constitute elements of the offense. Thus, there is no burden shifting concerning the elements of the crime themselves. Under Georgia law, it is not the "unlawful possession" of a machine gun or silencer that is a crime, but it is the mere possession of either one of these items that is a crime. Once the State has proven the necessary elements to show the possession, the defendant can then establish that he was authorized under the law to have these items in his possession.

The burden of going forward with the evidence can properly be placed on the defendant after the prosecution has "proven enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge, the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Speiser v. Randall, 357 U.S. 513, 524 (1958).

Respondent submits that the Supreme Court of Georgia properly determined that there was no impermissible shift of the burden of proof in the instant case. It is clear that the statutes in question set forth a crime and then provide certain defenses available to a defendant to this crime. Thus, as these exeptions are not elements

of the crime, the statutes are not unconstitutional in violation of the Fourteenth Amendment. Respondent submits that this Court should decline to review the decision of the Supreme Court of Georgia.

B. UNDER THE FACTS OF THE INSTANT CASE, NO BURDEN WAS IMPERMISSIBLY SHIFTED TO THE PETITIONER.

Even if this Court were to take issue with the wording of some of the statutes in the instant case, it is clear, as noted by the Supreme Court of Georgia, that no burden was ever shifted to the Petitioner by the trial court. The Supreme Court of Georgia thoroughly considered the charge of the trial court and found that the Court did not charge concerning the burden of proof of the exceptions or concerning the negativing of such exemptions. The exemptions were charged after the jury asked for a clarifying instruction. This time, the Court merely gave the exemptions applicable to machine guns under Ga. Code Ann. § 26-2907 and the exemptions applicable to machine guns and silencers from Ga. Code Ann. § 26-9914a(d). Thus, no burden shifting

or burden reducing charge as to the exemptions was given to the jury. Under this specific charge, Respondent asserts that there has clearly been no impermissible shift in the burden of proof or persuasion and that this Court should decline to grant certiorari.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, James Gregg Simmons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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This 24th day of December, 1980.

/s/
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